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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1669

JAMES E. GUSTAFSON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS

Petitioner James Gustafson stands convicted in a Florida state court for the crime of possession of an illegal drug, marijuana. Prior to his non-jury trial on that offense Gustafson sought, in the state trial court, to suppress the marijuana as evidence against him on grounds it was the fruit of an unlawful search. A transcript of relevant portions of the pre-trial evidentiary hearing on Petitioner Gustafson's motion to suppress is before the United States Supreme Court, at Petitioner's Appendix, 48-67. Petitioner Gustafson contends in the present United States Supreme Court certiorari review that the Florida state courts failed to uphold Petitioner's Fourth Amendment rights against unreasonable searches by allowing the marijuana to be used as evidence against him, resulting in his present criminal conviction.

On the twelfth of January, 1969, Lieutenant Paul R. Smith, a uniformed municipal police officer of Eau Gallie, Florida, was on routine patrol in an unmarked car when he encountered Petitioner James E. Gustafson driving south through the town at about 2:00 A.M. in the morning, [Petitioner's App. 49-50,53]. Lieutenant Smith fell in behind a 1953 white Cadillac, occupied by two white males, which was weaving across the center line and back to the right side of the road, [Petitioner's App. 50]. Lieutenant Smith observed

the car to weave in this manner about four times, [Petitioner's App. 50]. The Eau Gallie police officer then observed the two occupants of the Cadillac to look back, spot the officer, and attempt to evade the officer by driving across US 1 and behind a Winn Dixie Store and to head south on another city street, [Petitioner's App. 50]. Petitioner James Gustafson was the driver of that automobile, [Petitioner's App. 51].

Lieutenant Smith then turned on his flashing light and "pulled them over," and requested Petitioner Gustafson's driver's license, [Petitioner's App. 51,66]. Petitioner responded that he did not have his driver's license with him, that he had left it at home in an adjoining city, [Petitioner's App. 51, 65]. At that time Lieutenant Smith placed Gustafson under arrest for driving without possession of a driver's license, placed Petitioner by the patrol car and searched him, and placed him inside the car for transport to the city jail, [Petitioner's App. 51,63-64].

In searching Gustafson the police officer found and removed a little "long chain," and he removed a Benson and Hedges cigarette box from Petitioner Gustafson's left, outside coat pocket. Lieutenant Smith opened the cigarette box and observed marijuana cigarettes inside. [Petitioner's App. 51].

Lieutenant Paul Smith was questioned at the pre-trial hearing on Petitioner

Gustafson's motion to suppress, concerning the officer's intent when he stopped Gustafson's white Cadillac:

"Q Did you pull them over because of the weaving?

A Yes, sir.

Q And it was your intention to arrest the driver for some driving violation?

A No, sir, it was my intention to find out why he had been driving that way, if he had been drinking or something.

Q I see. When Mr. Gustafson got out of the car did you detect an odor of alcohol about his person?

A No, sir.

Q Was there anything in his mannerisms that suggested he was intoxicated?

A He appeared to me to be intoxicated by his actions and the bleeriness of his eyes.

Q You detected no odor of alcohol?

A No, sir."

Petitioner's App. 57-58

Lieutenant Smith also confirmed that he wrote eight to ten traffic citations per week, and that maybe three or four out of every ten persons arrested by him for the offense of driving without a license were taken into custody to the police station, [Petitioner's App. 60]. He also testified that he always searched a suspect before placing him into the patrol car, [Petitioner's App. 63,66].

The citation given by Lieutanant Smith to Gustafson, for the offense of driving without a driver's license in his possession, was also introduced in evidence at the pre-trial hearing, [Petitioner's App. 51-52].

Based on the foregoing facts presented to the state trial court at the pre-trial hearing on Gustafson's motion to suppress, the trial judge admitted the marijuana into evidence, and Gustafson's conviction resulted. On direct criminal appeal to the Fourth District Court of Appeal, State of Florida, the appeals court reversed Gustafson's conviction. The state appellate court in its opinion extensively surveyed the authorities on "evidence" searches incident to arrest -- relying on the same numerous authorities given in Petitioner's arguments now to this court -- and determined there was no "nexus" between the search yielding the marijuana on Gustafson's person and the offense for

which he properly was under arrest. The appeals court also rejected the search in this case as a "protective" search, saying:

> "When the officer determined to arrest appellant and to place him in the squad car to be taken to the police station, he had a right to conduct a custodial search of appellant's person for his own protection and to prevent escape. An officer cannot be expected to place a suspect in the rear seat of his squad car without first searching him for weapons which might be used against him en route to the station house.
>
> The custodial search is limited to weapons and instrumentalities for escape. In the instant case the officer removed a cigarette package from appellant's coat pocket and inspected the contents. Surely he did not expect to find a dangerous weapon inside the small, light cigarette package. We do not require the arresting officer to close his eyes to evidence of other crimes which he may discover in the course of the search, but we do require the officer to limit the scope of his search to one for weapons

> or instrumentalities of escape. The only reasonable conclusion to be drawn from the officer's conduct is that he was searching for something other than a weapon, and under these circumstances such a general search is unwarranted and unlawful."
>
> Gustafson v. State, 243 So.2d 615, 625 (4 DCA Fla.1971).

The State of Florida successfully obtained certiorari review of the Fourth District Court of Appeal decision by the Florida Supreme Court. The Florida Supreme Court reversed the Fourth District. The Florida Supreme Court held basically that there was a reasonable suspicion that Gustafson was driving while intoxicated, consequently a search for the intoxicant at a time when Gustafson was lawfully under arrest was "reasonable" under Fourth Amendment standards; and the Florida Supreme Court rejected outright the Fourth District's "nexus" requirement for searches of the person. State v. Gustafson, 258 So.2d 1 (Fla.S.Ct.1972).

The United States Supreme Court now may decide whether Lieutenant Paul Smith's search and seizure of the marijuana cigarettes on James Gustafson's person was accomplished within the intent of the "reasonableness" standard of the Fourth Amendment.

SUMMARY OF ARGUMENT

Evidence obtained pursuant to a search of Petitioner Gustafson, after his being stopped about 2 A.M. for weaving his automobile across the center line four times and after his subsequently being arrested for driving without a license, was constitutionally reasonable in scope and purpose.

A municipal police officer stopped the Petitioner's car to determine "why he had been driving that way, if he had been drinking or something," and observed that, although Petitioner was bleary-eyed and acted intoxicated, he did not smell of alcohol. Upon arresting Petitioner for driving without a license, the officer searched Petitioner and removed from his person a little "long chain," and a Benson and Hedges cigarette box which the officer opened and observed marijuana cigarettes inside.

This search was constitutionally reasonable (A) as a routine, necessary protective search pursuant to the arrest; and (B) because supported by probable cause for an evidence search independent of the crime for which Petitioner was actually arrested.

(A) A police officer has the right to protect himself and prevent the possible escape of an arrestee, by searching the arrestee before transporting him to jail in the officer's police

cruiser.

That Petitioner in this case had taken evasive driving actions when he noticed the uniformed officer following him in an unmarked car, was merely one reminder that apprehended persons are often less than cooperative.

A search of a person for weapons pursuant to a valid arrest is an unquestioned right to self-protection of an arresting officer. A cigarette box is not too small to contain some harmful weapon (a razor blade or knife come readily to mind) with which an arrested criminal suspect could injure an officer or affect an escape. Indeed, the small "long chain" also removed from Petitioner was a potential weapon smaller than a cigarette box.

(B) The officer had probable cause to stop and to arrest Petitioner for driving under the influence of some intoxicant. That the officer chose to arrest Petitioner initially for driving without a license does not alter the fact that the officer also had sufficient probable cause to arrest Petitioner for driving while intoxicated.

An officer may search, pursuant to a valid arrest, for evidence of the crime. The officer in this case could have arrested Petitioner specifically for driving while intoxicated and searched him for drugs pursuant to that arrest,

without question.

The State of Florida maintains that an evidence search of a person legally arrested logically extends to evidence of any other crime for which the officer also has probable cause for arrest.

ARGUMENT

The Fourth Amendment to the United States Constitution strictly limits the power of law enforcement officers to make searches in the process of investigating crimes and enforcing laws. In the present case a law officer arrested James Gustafson on a traffic offense unrelated to drugs, and upon taking him into custody searched his person, which search included removing a cigarette box from his coat pocket and examining inside that box. Inside the box was found an illegal drug, marijuana. James Gustafson's present criminal conviction is for possession of that drug. The single question before the United States Supreme Court is whether the search that yielded the illegal drug comports with limits imposed by the Fourth Amendment.

Petitioner James Gustafson contends that the Fourth Amendment prohibits as unreasonable in purpose and scope the "extensive evidence search" of a person arrested for a minor traffic offense. The State of Florida responds that the search that occurred here was constitutionally sound as a "reasonable," routine protective search incident to the fact of arrest, regardless of the grounds for an arrest; and that it was also "reasonable" under Fourth Amendment standards in that it was supported by probable cause for an evidence search independent of the crime for which

Petitioner Gustafson was placed under arrest.

I. PROTECTIVE SEARCH

The Eau Gallie municipal police officer's search of James Gustafson was entirely proper as a routine protective search incident to the custodial arrest of James Gustafson. It is uncontested by Petitioner Gustafson that the arrest in this case was a valid custodial arrest.

> "In the present case we have . . . conceded the authority to the police officer to temporarily detain and question the petitioner and the legality of his decision to take the petitioner into custody."
>
> Brief of Petitioner, at (emphasis added)

The State of Florida agrees with Petitioner Gustafson where he says,

> "The central issue in this case concerns the question of 'reasonableness' of the police officer's activities in light of his decision to arrest and take the petitioner into custody."
>
> Brief of Petitioner, at

In resolving that issue, however, one

cannot look simply to the crime for which the accused is arrested -- as Petitioner Gustafson suggests. First, an arrest by any other name is still an arrest. It is total, physical custody by force or threat of force, and it occurs without -- or regardless of -- the arrestee's consent. Second, the question whether an officer should anticipate an individual to resist, by force, the imposition of a routine traffic "stop," is totally distinguishable from the question whether an officer reasonably should take precautions against that same individual resisting, by force, a custodial arrest on the same traffic charge, or against his subsequently attempting an escape. It is not the charging of a crime that the arrestee is expected to resist; it is the fact of his custody by the law officer.

The State of Florida agrees with Petitioner Gustafson that there are no fruits or instrumentalities of the offense for which Gustafson was arrested that the officer would have been warranted in searching for.[1] However, since further detention of Gustafson was contemplated, there was a need to search for weapons and other means of possible escape from custody. It is

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1 See: People v. Gonzales, 356 Mich. 247 97 N.W. 2d (1959)

this latter fact that Petitioner Gustafson fails to acknowledge in his arguments to this Court.

The State of Florida submits that a comprehensive weapons search incident to a valid custodial arrest is always "reasonable" under Fourth Amendment standards, regardless of any lack of "nexus" between the crime charged and the search. The nexus for the comprehensive weapons search is the fact of a custodial arrest, not the nature of the offense leading to the arrest. Either the law enforcement officer does have a right to perfect and secure a complete custodial arrest, or he does not.

The right to search a person incident to arrest is fundamental.

> "It is unreasonable searches that are prohibited by the Fourth Amendment. Carroll v. United States, 267 US 132, 147, 69 L ed 543, 548, 45 S Ct 280, 39 ALR 790. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required. The right of the "people to be secure in their persons" was certainly of as much concern to the framers of the Constitution as the property of the person. Yet no one questions

> the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. Weeks v. United States, 232 US 383, 392, 58 L ed 652, 655, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177. Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him."
>
> United States v. Rabinowitz, 339 U.S. 56,60.

The authority for, and constitutional propriety of, a complete search of a person arrested is clear.

> "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. Weeks v. United States, 232 US 383, 392 58 L ed 652, 655, 34 S Ct 341, LRA1915B 834 (1914); Agnello v. United States, 269 US 20, 30, 70 L ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925)."
>
> Preston v. United States, 376 U.S. 364, 367.

Since it is well recognized that it is constitutionally proper to search a person, upon his custodial arrest, for protective reasons, the State of Florida maintains that the instant search was a reasonable one within the scope of a protective search. Regardless whether "probable cause" existed for the Eau Gallie police officer to search James Gustafson for the instruments or fruits of any crime, the officer was authorized to search Gustafson's person for weapons and other instruments which the arrestee might use to effectuate his escape, as incidental always to the fact of a custodial arrest having occurred.

The officer was obviously justified in searching the cigarette box found on Gustafson's person in an effort to find concealed small weapons such as a razor blade, pen, pencil, or penknife; and he was justified in searching for other instrumentalities of escape such as a handcuff key or key substitute.

A majority of courts have viewed the fact of lawful arrest alone as sufficient to satisfy any reasonableness standard.[2] The "facts of life"

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2 Comment, Searches of the Person Incidental to Lawful Arrest, 69 Colum. L. Rev. 866, (1969); e.g., Hanks v. State, 195 So.2d 49 (3 DCA Fla.1967).

for law officers in Florida, sustain the majority view:

> "A total of 3,231 assaults on county and municipal law enforcement officers in Florida were reported during the year 1972 . . . 2,823 assaults reported for the year 1971."
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> CRIME IN FLORIDA, State of Florida Department of Law Enforcement 1972 Annual Report, at 72.

Traffic pursuits and stops gave rise to 463 of those assaults on Florida law officers in 1972. Id., 73.

A breakdown of the 1972 Florida assaults on police officers shows 234 assaults by firearm, 89 by knife or cutting instruments, 373 by "other dangerous weapons," and 2,127 by hands, fists, feet, etc. Id., 75.

An informative discussion of search of the person incidental to his arrest is presented in: Comment, Searches of the Person Incidental to Lawful Arrest, Colum.L.Rev. 866 (1969).* That law

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* See also: Case Comment, Criminal Law: Personal Searches Incident to Traffic Arrest -- No Nexus Necessary?, 25 U.Fla.L.Rev. 239 (1972)

review article discusses specifically the propriety of searches incident to traffic arrests, Id., 871-875, and the article seeks to criticize adversely the suggestion that a traffic arrest renders a weapons search -- not to be confused with an evidentiary search -- to be ipso facto reasonable.

> "A protective search for weapons should be justified by an arrest alone only to the extent that the arrest creates a reasonable suspicion that the suspect is armed and dangerous. The mere arrest for a traffic violation would not appear to create such a reasonable belief. It follows that if a protective search is justified at the time of arrest for a traffic violation, it is because of circumstances other than the arrest."
>
> Id., at 874

This argument overlooks the distinction between the common, non-custodial traffic "stop", and the the less common custodial arrest for a traffic offense, such as occurred in this case. The argument also overlooks 463 battered Florida law officers as result of traffic pursuits and stops in 1972.

Petitioner Gustafson suggests that the Eau Gallie police officer could not "reasonably" have searched Gustafson's

person because there was a total absence of any indication that the officer, in arresting Gustafson, was dealing with an armed and dangerous individual. Gustafson's suggestion is valid, and should be adopted by the Court, only if this Court also can guarantee to law officers that a criminal-accused in police custody will give some indication, some forewarning, of uncooperativeness before assaulting a police officer. Absent a judicial determination that such forewarnings visibly occur as a matter of course, there is no reasonable basis for denying law enforcement officers the power to make their arrests complete and secure from the first moment of detention. It is totally inconsistant on Gustafson's part to concede, on the one hand, that he was lawfully placed under custodial arrest by the Eau Gallie municipal police officer, yet to contend, on the other hand, that the officer could not also take precautions to effectuate and secure that custodial arrest.

In a nation such as the United States where personal violence is a traditional and common solution to problems, it would border on the ridiculous to deny police officers complete authority to perfect and secure a custodial arrest, while at the same time requiring or even expecting those officers to place their own lives "on the line" in order to attempt such arrests. The Eau Gallie

police officer's search of James Gustafson was reasonable both in purpose and in scope. Indeed, it was more than simply "reasonable," it was "necessary" as required by a commonsense understanding of the potential threat of violence to any law officer whenever he takes an accused into complete physical custody for transportation to jail, regardless of the nature of the charges.

Neither are violations of traffic ordinances of such insignificant criminal nature as Petitioner Gustafson would have this Court believe. For many people the potential loss of their driver's license -- vital to their livelihood -- is more to be feared than a fine or short term of imprisonment. And, is it not also true that far more American citizens are killed and maimed as the result of driver ordinance violations (i.e., driving while intoxicated, speeding, etc.) than are killed or injured by all other crimes combined?

Petitioner Gustafson contends that this Court's decisions in Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, 392 U.S. 40 (1968), prohibited the search that occurred in this case. Terry dealt with the propriety of searching three men on foot who appeared to be "casing" a store in Cleveland, Ohio; and Sibron dealt with the validity of New York's "stop-and-frisk" law and the search of Sibron upon being called

by a law officer onto the street from inside a restaurant. Both Terry and Sibron dealt with street confrontations between officers and pedestrians; neither dealt with a traffic arrest; and neither dealt with searches conducted immediately after and incident to an arrest. The fundamental distinction between the Terry and Sibron cases and the present case is that Terry and Sibron are a judicial delineation of standards for searches, where police officers need to search for weapons in situations lacking probable cause to arrest for crime. The searches in Terry and Sibron preceded the arrests. However, the present case raises an issue of the constitutional propriety of searching Gustafson immediately after, and pursuant to, a valid arrest.

Petitioner Gustafson in his arguments fails to acknowledge the fundamental differences between a constitutionally valid search incident to a "stop-and-frisk" encounter and a constitutionally proper search incident to taking an arrestee into custody.

A valid custodial arrest ipso facto renders permissible a search for weapons.[3]

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3 Parnell v. State (3 DCA Fla.1967) 204 So.2d 910; United States v. Rabinowitz, 339 U.S. 56 (1950); Preston v. United States, 376 U.S. 364 (1964).

The holdings in Terry and Sibron, (that in the case of a self-protective search for weapons the officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous), has no bearing on a search conducted incidental to a valid custodial arrest.

Gustafson argues that this Court's opinion in Chimel v. California, 395 U.S. 752 (1969), changed the traditional rule on searches incident to an arrest. He suggests that in Chimel emphasis was placed upon the critical language of Terry saying that, ". . . [t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible . . ." 395 U.S. at 762; Brief of Petitioner, at . Petitioner Gustafson misconstrues the opinion in Chimel. The Chimel pronouncement dealt solely with the reasonableness of a search of the "place" where an accused is arrested. The Chimel opinion nowhere intimates that a weapons search of the "person" of the arrestee is not, ipso facto, reasonable. Indeed, the Chimel opinion specifically recognizes the continued validity of searching the "person" of an arrestee incidental to his arrest, wherein the opinion acknowledged again that,

> "When an arrest is made, it is reasonable for the arresting officer to search the person

> arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated."
>
> Chimel v. California, 395 U.S. 752, 762-763.

Petitioner Gustafson erroneously relies on Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir.1968), as Federal authority for a "nexus" argument. Petitioner fails to acknowledge that Amador-Gonzalez dealt with the search of a "place," not of a person, incident to his arrest. Amador-Gonzalez concerned the propriety of searching the accused's automobile incidental to a "pretext" traffic arrest. In ruling the search in that case to have been improper, the Fifth Circuit Court of Appeals specifically reaffirmed the ". . . well-recognized exception that as an incident to arrest, either with or without a warrant, the arresting officers may search the person arrested and his immediate surroundings." 391 F.2d 308, 313, 314.[4]

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[4] See also: Williams v. United States, 412 F.2d 729 (5th Cir.1969); Jack v. United States, 387 F.2d 471 (9th Cir. 1967), cert.den., 392 U.S.934 (1968).

It is significant to note that, with the exceptions of Terry and Sibron which dealt with pre-arrest searches of the person in a "stop-and-frisk" situation, every one of the United States Supreme Court opinions relied upon in Gustafson's arguments are cases which dealt solely with searches of a "place" in conjunction with an arrest. None dealt with the constitutional propriety of searching the "person" arrested, incident to his custodial arrest. This is true of Weeks v. United States, 232 U.S. 383 (1914), [search of the accused's house some distance from the arrest]; Carroll v. United States, 267 U.S. 132 (1925), [search of the arrestee's home some distance from place of arrest]; Marron v. United States, 275 U.S. 192 (1927), [search of premises where liquor was unlawfully manufactured and consumed]; Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), [search of offices of persons lawfully arrested]; United States v. Lefkowitz, 285 U.S. 452 (1932), [search of desk drawers and a cabinet incident to nearby lawful arrest]; Harris v. United States, 331 U.S. 145 (1947), [search of entire four-room apartment incident to arrest of occupant therein]; Trupiano v. United States, 334 U.S. 699 (1948), [seizure of illicit distillery incidental to arrest of operator]; United States v. Rabinowitz, 339 U.S. 56 (1950), [search of one-room office incident to valid arrest]; and Chimel v. California, 395

U.S. 752 (1969), [search of entire house incident to proper arrest, but without a search warrant].

Petitioner Gustafson seeks to establish something totally new in the law: something less than a custodial arrest but more than a "stop-and-frisk." He proposes a custodial arrest without precautionary steps to secure the arrest, yet does not propose a system whereby law officers can reasonably foretell when a traffic arrest that is custodial in nature will be resisted, or an escape attempted, by force against the officer.

It would appear far more sensible to tell a law enforcement officer that in a given situation he may not perform a custodial arrest, rather than to tell the officer he may arrest a person but must refrain from a protective search of the party arrested. The United States Supreme Court, in this case, should instruct the law enforcement officers in this country:

> You may, as an incident to any valid custodial arrest, make a warrantless search of the arrested person. Your search of his person must be performed at the time of or immediately after his arrest, unless there are very compelling circumstances for a temporary delay of the search. You may

> search for weapons and instruments of escape, and for fruits or instruments of the particular crime for which you have arrested the person. Your "incidental" search of the person is limited to the scope reasonably necessary to comply with these purposes.

The facts of the present case show full adherence to the foregoing standard. The Eau Gallie police officer in good faith routinely searched James Gustafson's person incident to Gustafson's custodial arrest, and the officer's search was clearly within the scope and intensity of a necessary and routine protective search for weapons large and small.

Even if the "nexus" argument urged by Petitioner were to be held applicable to protective searches, the search of Gustafson was proper. A reasonable suspicion, that a protective search of Gustafson was necessary, was justified by the lateness of the hour (two o'clock in the morning) and by the fact that the two occupants of the white Cadillac, upon turning around in their seats and discovering the presence of a uniformed officer in the unmarked car on the road behind them, immediately took evasive driving actions. So, by the time the officer had arrested Gustafson, he knew that Gustafson already had demonstrated a lack of interest in cooperating with the law enforcement personnel. Our law must recognize the reasonableness

of an officer's responding with considerable caution to such early morning conduct by a person being arrested. The police officer's own life is the potential cost for his inattention to such overt indications of a desire to avoid contact with a law enforcement officer.

II. EVIDENCE SEARCH

The Eau Gallie municipal police officer in this case had a lawful and uncontested right to arrest James Gustafson for driving without possession of his driver's license. The city policeman also had, however, probable cause to arrest James Gustafson for the additional crime of driving while intoxicated, and the incidental right upon such arrest to search Gustafson's person for the intoxicating instrumentality of that offense. That the officer did not choose to charge this additional criminal violation when he arrested Gustafson on a separate offense, does not alter the fact that he was authorized to do so, or that he did have the concurrent probable cause to search.

The following facts, developed in the pre-trial evidentiary hearing on Gustafson's motion to suppress, established probable cause for an arrest and incidental search of Gustafson on a charge of driving while intoxicated. In fact, they established probable cause to search the lawfully arrested Gustafson specifically for drugs.

First, the police officer had observed Gustafson to weave across the center line and back, four times. Second, the officer's express reason for stopping Gustafson's vehicle was, "to find out why he had been driving that way, if

he had been drinking or something." Third, the officer saw Gustafson and his companion take evasive steps as soon as they noticed the officer's presence. Fourth, the officer judged, from Gustafson's actions and the bleariness of his eyes when he was apprehended, that Gustafson was in fact intoxicated. Finally, when the officer approached Gustafson he could detect no odor of alcohol.

The weaving and the bleary eyes established probable cause to believe Gustafson to have been intoxicated. The absence of an alcoholic smell established probable cause to believe he was intoxicated on a substance other than alcohol; to wit: drugs, lawful or otherwise. And, the evasive actions taken by Gustafson when a police officer's presence was discovered established an intent by Gustafson to prevent the law enforcement officer from discovering some fact or some item.

In Florida it is a criminal offense to drive while intoxicated, regardless of whether the intoxicant be alcoholic drink, unlawful drugs, prescription drugs, or non-prescription drug-store cure-alls; cf., Florida Statutes §317.201, (In recognition of the fact that a drunk driver is just as deadly a roadway menace when drunk on a doctor's medicine as on alcohol or illegal drugs). And, as conceded in

Petitioner's own survey of applicable law, a police officer does have authority to search incidental to a custodial traffic arrest, to the extent of searching for the instrumentalities or fruits of the crime for which the arrest itself is made.[5] The officer in this case could have arrested Gustafson specifically for driving while intoxicated, and searched for one instrumentality of that offense, drugs.

The State of Florida suggests that where a party is lawfully arrested on one criminal charge, and at that moment there exists "probable cause" for an arrest and incidental search on yet another charge, it is prima facie reasonable for the arresting officer to search the person in his custody for the instrumentalities and fruits of that other charge, without the necessity of arresting the party also on grounds of the additional crime. Such a rule benefits the accused.

So long as the "probable cause" requirement is included as to both crimes, there is no basis for claiming that this rule opens any doors for "pretext" arrests and bad faith searches by law

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5 Chimel v. California, 395 U.S. 752 (1969); State v. Gustafson, 258 So. 2d 1, 3 (Fla.S.Ct.1972) at N. 4.

officers.

The State of Florida would also suggest that where there exists even a "reasonable suspicion" that a person lawfully under arrest has on his person evidence of another crime, the arresting officer at the time of arrest may search for that evidence. If the United States Supreme Court in Terry and Sibron was willing to acknowledge the reasonableness of searching free citizens for weapons on something less than probable cause, then it also should be willing to acknowledge the reasonableness of searching persons in lawful custody, on something less than probable cause for an arrest and search on additional charges.

The Florida Supreme Court's observations on this point make good sense:

> "A reasonable suspicion (which was present here) that the driver was intoxicated not only justified stopping the vehicle, but also justified searching for intoxicants or drugs, inasmuch as our statute makes the influence of either an offense. In today's proliferation of illegal drug use which affects the faculties, checking only for liquors is no longer adequate. The new and devastating use of

> various drugs in myriad forms (unhappily by drivers in dangerous instrumentalities) imposes the further duty upon the alert police officer to examine as well for such drugs in their various forms. Statistics are now reporting that 1 in 5 fatal traffic accidents involve the use of intoxicants or drugs. Finding the marijuana cigarettes in the natural place of a cigarette package is no different than finding liquor in a liquor bottle. It is no less a proper search and seizure."
>
> State v. Gustafson, 258 So.2d 1, 2 (Fla.S.Ct.1972) (footnote omitted)

Regardless of whether this Court recognizes one or both of these standards, the Court also should consider the "exigent circumstances" necessitating a warrantless search for drugs on the person of the lawfully arrested Gustafson. Drugs concealed on the person are always subject to immediate destruction, by personal consumption or otherwise. Consequently, the existence of "probable cause" to believe the drugs were on his person warranted an immediate search to secure that evidence.

The opinion of the Florida Supreme Court which is here on certiorari review gave extensive attention to the facts

which made the Eau Gallie lawman's search of Gustafson a "reasonable" evidence search -- aside from the question of the search's propriety as a protective measure. That same "reasonableness" standard should be affirmed now by the United States Supreme Court.

In construing the Fourth Amendment's reasonableness requirement as applicable to the facts of this case, the United States Supreme Court must acknowledge the needs of law enforcement and of police policies reasonably necessary to meet those needs. Only in that context can the Court fairly analyze the individual citizen's rights under the Fourth Amendment.

> "This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . .' Gouled v. United States, 255 U.S. 298, 304, 65 L.Ed.647, 650, 41 S.Ct.261 (1921).
>
> This Court has also pointed out that it is only unreasonable

> searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' Go-Bart Importing Co. v. United States, 288 U.S. 344, 357, 75 L.Ed. 374, 382, 51 S.Ct.153 (1931).
>
> The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states."
>
> Harris v. United States, 331 U.S. 145, 150-151. (footnotes omitted)

The instant case is clearly distinguishable from the case of U.S. v. Robinson, 471 F.2d 1082 (D.C.Cir.1972), cert. granted, 93 S.Ct.1500 (1973) (No. 72-396, 1972 term), wherein the officer had no reason to think the arrestee was guilty of more than driving with an improper license; whereas, in the instant case, the officer reasonably suspected that the arrestee was driving while

intoxicated. Unlike the Robinson case, the search of Gustafson was well within any scope-limitation principle, since the officer stopped Gustafson for weaving while driving and after stopping him observed that Gustafson appeared bleary-eyed but did not smell of alcohol. In examining this case ". . . on its own facts and circumstances . . ." it becomes obvious that it was a reasonable search that led to discovery of the drugs on Petitioner James Gustafson's person and resulted in his criminal conviction. The rights of the citizen in a free society are not challenged by a search such as occurred in this case.

CONCLUSION

WHEREFORE the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent has been furnished to Honorable Michael F. Cycmanick and Honorable James M. Russ at Law Offices of James M. Russ, 441 First Federal Building, Orlando, Florida 32801, by mail this day of June, 1973.

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